

(2017) 10 GUJ CK 0005
GUJARAT HIGH COURT
Case No: 1219 of 2017

S.K. SRIVASTAV

APPELLANT

Vs

CONTAINER
CORPORATION OF
INDIA LTD

RESPONDENT

Date of Decision: Oct. 30, 2017

Acts Referred:

- Constitution of India, Article 226 - Power of High Courts to Issue certain writs
- Indian Penal Code, 1860, Section 420, Section 468, Section 471, Section 467, Section 120-B, Section 477-A - Cheating and dishonestly inducing delivery of property - Forgery for purpose of cheating - Using as genuine a forged document - Forgery of valuable security, will, etc

Hon'ble Judges: S.R.Brahmbhatt, R.P.Dholaria

Bench: Division Bench

Advocate: VIRAT G POPAT, RAVI KARNAVAT

Final Decision: Allowed

Judgement

1. Heard learned counsels appearing for the parties.

2. The petitioner, who happens to be recipient of the order dated 06.01.2017 in respect of he being black listed by the respondent on account of allegations of he supporting two officers in embezzling the funds of respondent, has approached this Court by way of this petition filed under Article 226 of the Constitution of India with following prayers.

(a) To allow this petition;

(b) To issue a Writ of Mandamus and/or any other appropriate writ, order of direction quashing and setting aside the impugned communication dated 06.01.2017 bearing No.CON/ NWR/ CIVIL/ MISC/ 2016- 17/2923 issued by the respondent herein;

(c) To hold and declare that the action of the respondent in blacklisting the petitioner vide impugned communication dated 06.01.2017 bearing No.CON/ NWR/ CIVIL/ MISC/ 2016-17/2923 as bad in law and further be pleased to set aside blacklisting of the present petitioner;

(d) Pending admission, hearing and final disposal of the present petition, to stay further execution, implementation and operation of the impugned communication dated 06.01.2017 bearing No.CON/ NWR/ CIVIL/ MISC/ 2016- 17/2923 issued by the respondent;

(e) Pending admission, hearing and final disposal of the present petition, to stay blacklisting of the present petitioner issued vide impugned communication dated 06.01.2017 bearing No.CON/ NWR/ CIVIL/ MISC/ 2016-17/2923 by the respondent herein;

(f) To pass any other and further orders as may be deemed fit and proper to this Hon"ble Court.

3. Facts in brief, as could be culled out from the memo of petition deserves to be set out as under:

3.1 The petitioner is a contractor involved and associated with the respondent i.e. Container Corporation of India which is Government of India undertaking since last 7 to 8 years. The petitioner had been issued different contracts in railways with regard to maintenance and other miscellaneous civil work. After the blacklisting of the present petitioner, as a fall out other contracts which were existing with the petitioner came to be terminated vide different letters by the respondent. On account of blacklisting the other contracts were also terminated which would indicate that the existing vested right of the petitioner is affected on account of blacklisting.

3.2 It appears that an inquiry was initiated against two of the employees of the respondent viz. Mr. Bhaumik Kantharia - Supervisor and Mr. Joy Aich - General Manager, Finance. Against the said person a case for misappropriation has been registered with the CBI, New Delhi vide Crime R.C. No.217/2016/A/0008 under Section 120-B, 420, 467, 468, 471, 477-A of the I.P.C. and the provisions of Prevention of Corruption Act. During the course of the investigation it was found that certain payments which were made to the petitioner against bill were booked in the name of Western Railway whereas the payment were made for the personal work of above said two persons.

3.3 Therefore, vide communication dated 08.11.2016, the petitioner was asked to explain the payment of Rs.11.51 lakh booked in the name of Western Railway. Thereafter, vide detailed reply dated 22.11.2016 the petitioner submitted explanation against show cause notice. The petitioner has also provided purchase bill etc. for the work which petitioner has undertaken for the aforesaid person. Dining table, sofa-bed, cupboards etc. were made and the petitioner has raised his bills against which the said demand drafts were issued.

3.4 The bills of the petitioner have been seized by the CBI and the petitioner has also written a letter to CBI on 16.01.2017 to provide copy of this bills. The petitioner has received Rs.11.51 lakh by way of a demand draft. For some work which was undertaken at the place of said two officers, the said payment was done by demand draft. The petitioner was not aware that the money which was belonging to the respondent are being paid by the concerned person for the work. Nonetheless, it is the demand draft which was given to the petitioner which did not contain any identification or traces by which one can understand that the said payment though is being done by an individual would be booked in future in the name of respondent. Apart from that the payments were made in the year 2014 and action is being taken after almost two years from the date of payment, despite that the petitioner has provided all details to the authority as well as the CBI. Hence, the present petition.

4. Learned counsel appearing for the petitioner invited Court's attention to the order impugned at page no.17 and submitted that this order does refer to a show cause notice dated 08.11.2016 and the petitioner's reply dated 22.11.2016. Unfortunately, both these communications and contents thereof have not been reflected in the body of the order nor is the authority careful to indicate any reason for not accepting the petitioner's submission contained in the reply dated 22.11.2016.

5. The petitioner's counsel further submitted that the order of blacklisting has unfortunately worked as a very harsh step nullifying his chances to participate in any tendering process and bid inviting process by the respondent corporation and in this view of the matter the rights of the petitioner in seeking equal participation and fair treatment

from the respondent is jeopardized on account of the order impugned which is very cryptic and without any reason whatsoever.

6. Learned counsel for the petitioner invited Court's attention to the observations of the Supreme Court rendered in case of Assistant Commissioner, Commercial Tax Department, Works Contract And Leasing, Kota Vs. Shukla And Brothers, reported in (2010) 4 Supreme Court Cases 785, to support his contention that the observations of the Supreme Court mentioned in paragraph nos.12 and 13 would clearly indicate that even in a contractual matter when the lease or the parties' rights are likely to be affected the administrative authorities have to pass reason order and in the instant case the order impugned on the face of it would clearly indicate that the same is not passed assigning any reason which could indicate that there was a proper application of mind, hence, the same is required to be quashed and set aside.

7. Learned counsel for the petitioner further submitted that the said cryptic order and its infirmity cannot be cured by the respondent by supplying reasons by way of affidavit before this Court. He further submitted that though the reasons sought to be supplied by the respondent in the affidavit also do not merit consideration for justifying the order, as the authorities have miserably failed in not appreciating the aspect of the role which could be attributed to the present petitioner for the wrong done by two officers in question.

8. The counsel for the petitioner submitted that this Court may quash and set aside the order and permit the petitioner to make proper representation before the authority and the authority be directed to pass appropriate order after hearing the petitioner and taking into consideration all the contentions that he may raise in the said representation.

9. Learned counsel appearing for the respondent submitted that the authorities have acted bonafide and in the interest of public, as the show cause notice if read closely would clearly indicate that the said communication was in continuation of the order of ongoing inquiry in respect of the embezzlement of two officers and as there is involvement in the CBI and as the CBI is also undertaking inquiry, the petitioner cannot be permitted to say that the show cause notice and the impugned orders are cryptic so as to invite any quashment from the Court.

10. Learned counsel appearing for the respondent invited Court's attention to the affidavit-in-reply and urged the Court for close perusal of paragraph nos.12 and 13, which have been reproduced hereunder to support his contention qua the genuineness and justification for issuing show cause notice as well as the order of blacklisting.

"12. I state that the petitioner has admitted that most of his payments were made by RTGS and Demand Draft. I state that the petitioner has also admitted that he has received the sum of Rs.11,51,161.00 by way of various demand drafts. It is

further admitted that in addition to the aforesaid sum of 11,151,161.00 the petitioner has also received the sum of Rs.1,87,825.00 again by way of demand draft. The petitioner has claimed that he has carried out work of furniture like dining table, sofa, bed, cupboards etc. as said out in paragraph no.3.8 of the petition for private work of two officers of respondent. I state that the in support of such contentions the petitioner has produced bills of various raw material suppliers to justify that he has manufactured such items. For the ready reference, of the Hon"ble Court, material details pertaining to raw material procured are reproduced in the tabular statement herein below:

Sr. No.	Page No. of book	Invoice Value (in Rs.)
1	30	31,643.00.
2	31	8,215.00.
3	32	26,106.06.
4	33	82,856.00.
5	34	27,946.00.
	Total amount for raw material procured	1,76,766.06

Thus, as per the petitioner, he has supplied goods, the raw materials of which cost him Rs.1,76,766.00 by no stretch of imagination it can be stated that the finished product to the description given herein before with such raw material would cost approximately Rs.13,38,986.00. The petitioner needs to substantiate receipt of these amounts towards such work by appropriate VAT payments and other statutory payments towards taxes and levies. I therefore state that the similarly the petitioner has conveniently placed the ledger accounts on page no. 37 and 38 of the petition. Interestingly the description of the goods is not provided in those ledger accounts. Had these ledger accounts has been prepared bonafidely or the petitioner had issued any bill in this regard, various details like the nature of goods supplied, quantity of goods supplied and other details would have been mentioned in the said ledger. The description of entries itself provides sufficient reasons to raise doubts about genuineness of such entries. The petitioner cannot feign ignorance. I state that from the averments made in the reply to show cause notice, it is clear that petitioner has worked privately only for those officers who authorized the payments of more than Rs.35,89,925.00 for unsubstantiated work to petitioner. The reply to show cause and supporting documents do not instill much confidence.

13. Apart from aforesaid, the petitioner has in his reply to the show cause notice has voluntarily, without asking has submitted that he is ready and willing to give back fifty percent of the amount which as per the answering respondent is unauthorized whereas as per the petitioner the same is in respect of personal work done at residence of two of its tainted officers. I state that, this readiness and willingness to refund of fifty percent of the amount itself suggests that the petitioner is not free from guilt; rather the petitioner is also involved in the entire tainted transaction. I state that such unconditional uninvited offer raises serious doubts about the integrity of the petitioner. Apart from this, there is a huge payment of Rs.22,50,939.00 made to the petitioner which is unsubstantiated. It is respectfully submitted that the petitioner has not uttered a single word about such unsubstantiated payment made to it that the notice to show cause indicates "these are in addition to other charges under investigation." The petitioner's silence on other charges categorically indicates his involvement. Therefore, after receipt of the response to show cause, to protect the interest of the respondent organization, the decision to black-list the petitioner is taken and such a decision is quite justified."

11. The counsel for the respondent further submitted that page no.35 is a communication dated 27.05.2016, which would also indicate that petitioner cannot plead any ignorance qua the development and therefore, petitioner is not justifying in conducting before the Court that there is no opportunity of being heard as the order impugned is unequivocally clear qua the reasons for communicating blacklisting the petitioner and as it has been tagged with CBI inquiry and investigation there cannot be any lack of justification on the part of the authorities in passing the order and therefore, he vehemently opposed this petition.

12. We are of the considered view that the order impugned if peruse closely would indicate that the same does not disclose any application of mind on the part of the authority, so far as submissions of the petitioner are concerned qua he being not held responsible for the embezzlement alleged and attributed to those two officers who being named and against whom the inquiry and the investigation has been initiated.

13. We hasten to add here that the observation of this Court shall not affect in any manner either the investigation by CBI or by the respondent against the officers and if there is need be against the present petitioner. We are of the considered view that when a citizen or a trader who has a right to do business is blacklisted so as to deprive him of his right to do business with the instrumentality of the State, the same action has serious civil consequences and therefore, the same can be undertaken only after affording complete opportunity and passing reason order and the submission that may be made by

the person concerned. In the instant case, the show cause notice as well as the order impugned even if it is read with Annexure-H communication dated 27.05.2016, it cannot be said that there is a clear enlisting of the allegations which the petitioner is to answer and the order impugned also does not indicate as to how and in what manner petitioner could be attributed to have furthered or aided those two officers in embezzling the money for which they have been subjected to investigation and inquiry.

14. We once again reiterate our earlier observations that these observations are prima facie and shall not absolve the petitioner of any liability that may be found out against him to answer in law. We are inclined to quash the order impugned only on the ground that the said order is not passed as a result of complete compliance with the principle of natural justice and hence the respondents are under obligation to issue a fresh show cause notice and invite petitioner to make his submission and afford an opportunity to make it good and thereafter passed a reason order, if so requires.

15. With these observations, the order impugned is quashed. The petition is allowed to the aforesaid extent. The observations hereinabove are purely for examining the order's legality and infirmity and the same shall be no bearing whatsoever about the decision making process of the authority or the investigation against anyone in respect of the embezzlement and misappropriation.